IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 491

ALBERT ANDREWS,

Petitioner,

vs.

UNITED STATES.

No. 494

ROBERT L. DONOVAN,

Petitioner,

vs.

UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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INDEX

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I.

The District Court's Orders Were Interlocutory and Non-appealable.

Most of the Government's brief is devoted to the argument that the District Court had no jurisdiction to grant relief to petitioners under Rule 35, and that the District Court erroneously granted relief under 28 U.S.C. § 2255. The Government's entire argument in regard to its right to appeal the District Court's orders even if they were entered pursuant to § 2255 is to be found at pages 21-24 of its brief.

The Government contends (p. 22) that each petitioner "was granted all the relief he was entitled to ask when his sentence was set aside." This is tantamount to saying that Judge Murphy had no jurisdiction to order resentencing, that he exhausted his authority when he vacated the prior sentences, and that some new proceeding should have been initiated (the Government does not say what it might have been) looking toward eventual resentencing.

This is not the law and never has been. Petitioners sought and were granted the right to be resentenced, a direction by the Court that has yet to be carried out. Their motions, whether civil or criminal, cannot be viewed in a vacuum, detached like Ichabod's head from the criminal proceeding which brought them into being and which, as the Government concedes (p. 22), they reopened. The Court did not vacate petitioners' sentences, declare the proceedings closed, and set the petitioners on their way to obtain further relief in the original criminal case. The Court's orders, which bore the original *criminal* docket number, directed (1) that the sentences be set aside, and (2) that the petitioners be resentenced. If, as the Gov-

ernment says, the orders "terminated the authority of the United States," it is puzzling that petitioners were not granted bail pending the Government's appeal (R. 68, 73) and were not even given permission to come to the Second Circuit to prepare for the appeal (R. 62-63).

It is interesting in this regard that the Government does not choose to deal with such cases as *Collins* v. *Miller*, 252 U.S. 364 (1920), upon which petitioners relied (Brief for Petitioners, pp. 11, 20). For there, one of the habeas corpus orders was final, since it denied the writ and thus technically brought the proceeding to a close, and the other habeas corpus orders could also be considered "final" in the sense that Collins was remanded to the custody of a judge for further extradition hearings. This Court, however, refused to view the case in any such technical light but instead looked at all of the orders together and considered the true nature of what was done. And in any realistic sense, all of the orders were non-final, because the matter still had to be concluded. Hearings still had to be held and orders entered. And so here, too, Judge Murphy's orders, even if civil in nature, could be considered "final" only by the most strained, unrealistic and legalistic reasoning in an area where the Government's right to appeal should be restricted rather than broadened.

The Government says the petitioners have no interest in being resentenced. Quite to the contrary, every defendant serving a sentence—and particularly a mandatory sentence—is interested in being resentenced, and at the earliest possible moment. In the Federal system, unlike in most state systems, a sentence does not begin to run until the defendant is received at an institution for service of the sentence that has already been imposed. 18 U.S.C.A. § 3568 (Supp. 1962). When a defendant subsequently serves time, his sentence is vacated, and he is then resentenced, the

Court need not take into consideration the time he has already served. Although it is customarily the practice, of course, to award credit for such time by giving a shorter sentence on resentencing, there have been occasions when such credit has not been awarded. And in the case of a mandatory sentence, credit *cannot* be awarded; the only sentence that can be imposed is the mandatory minimum or a suspended sentence and probation. Judge Walsh avoided this dilemma in the instant case by allowing the original sentences to "remain unchanged and in full force and effect" rather than resentencing petitioners to 25 years (R. 33, 34), but there is no guarantee, of course, that this will always occur. The Attorney General is required by statute (18 U.S.C.A. § 3568 (Supp. 1962)) to give a prisoner credit for days spent in custody prior to imposition of sentence *for want of bail* where the sentence is a mandatory minimum, but this language has been interpreted by the Department of Justice not to apply to a case like the instant one where a sentence is vacated.[1] To date, the Department has given such credit as a matter of administrative discretion, but there is no legal guarantee, of course, that this practice will continue or will be applied in every case.

Thus, without expressing any view as to the legality of an attempted resentencing in which credit in one form or another is not given for time already served, we point out that every defendant obviously has a vital, immediate and basic interest in being resentenced after his prior sentence has been vacated, and resentenced at the earliest possible moment without the intervention of interlocutory Government appeals.

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[1] There have been moves to correct at least some phases of this anomaly. See, for example, Report of the Judicial Conference of the United States (1962), p. 35.

If, as the Government suggests (p. 23), it is "firmly established" that the Government may appeal the type of orders involved here, it is remarkable that the Government has not found a single case directly supporting such an appeal. Of the four cases cited in footnote 4, page 23, of the Government's brief, two (*Craig* and *Jung Ah Lung*) involved final orders discharging the petitioners from custody; one (*Ju Toy*) involved a final order declaring the petitioner to be a native-born citizen; and one (*Collins*), as pointed out above, held the orders to be interlocutory and non-appealable. The *Williamson* case, cited on page 24, also involved a final order (as pointed out on page 22 of the Brief for Petitioners), and in the *Bonner* case, cited on page 24 of the Government's brief, it was not even implied that an appeal would lie from the type of order issued by the Court. There is a serious question whether the *Kelly* case (p. 23) was correctly decided. But even if it was, it is easily distinguishable from the situation here, because in *Kelly* the judgment of conviction was vacated, a new trial was ordered, and the parties had to begin *ab initio*, as if nothing had gone before. Here, on the other hand, petitioners did not seek to have their judgments set aside, nor did Judge Murphy set the judgments aside. Petitioners stand today as convicted as they did the moment after the jury returned its verdict. Petitioners are not—in the words of § 2255—claiming in their motions "the right to be released," and the result of Judge Murphy's orders, as the Government concedes (p. 23), is to institute further proceedings in the original criminal case—namely, resentencing. *Kelly* was never cited by any court as standing for the proposition advanced by the Government here.

Thus, none of the cases cited by the Government stands for the proposition either that the orders here under re-

view are final[2] or that the Government can appeal from interlocutory orders under Rule 35 or § 2255. As pointed out in petitioners' brief, the precedents are to the contrary.

II.

Even If Final, the District Court's Orders Were Not Appealable Because They Were Part of the Criminal Case.

The Government does not argue that it had the right to appeal if Judge Murphy correctly granted motions under Rule 35. The Government does not dispute, in other words, that 18 U.S.C.A. § 3731 governs the Government's right to appeal in criminal cases, that motions under Rule 35 are part of the criminal case, and that § 3731 gave the Government no right of appeal in this case. Rather, the Government's position (pp. 8, 10, 15, 18, 19) is that the District Court had *no jurisdiction* to decide petitioners' motions as part of the criminal case. This argument is predicated on the theory that Rule 35 can be used only to attack a sentence which is illegal *on its face*. Three points should be noted in regard to this argument.

First, it is not supported by the language of Rule 35. That rule simply provides that "an illegal sentence" may be corrected at any time, and a sentence which cannot stand—which is in fact vacated—even though the judgment of conviction remains unaffected, must be an illegal sentence.

Second, the Government's argument is far broader than this Court was willing to go in *Heflin* v. *United States*,

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[2] Orders relating to criminal cases have been held non-appealable though having a far more "final" effect than the ones involved here. See, *e.g.*, *Flint* v. *United States*, D.C. Cir., Misc. No. 1387, filed December 3, 1959, and *Flint* v. *District Court*, D.C. Cir., Misc. No. 1388, filed December 3, 1959 (both unreported); *Mack* v. *United States*, 274 F.2d 582 (D.C. Cir.), *cert. denied*, 361 U.S. 916 (1959).

358 U.S. 415, 418, 422 (1959). In essence, the Court's position in that case was that Rule 35 is available to attack a sentence collaterally unless there must be a hearing to consider matters *outside the record*. Obviously, what this Court had in mind was that Rule 35 is available whenever the District Court, with the record before it, can decide the motion without holding a hearing. No hearing was necessary in this case. None was held. Judge Murphy decided the matter on the face of the record. Rule 35 clearly was the proper remedy.

Third, the Government's argument is inconsistent with its own position in other parts of its brief. For even the Government does not challenge the correctness of some cases in which Rule 35 has been used because defendants were absent at the sentencing procedure (see page 14 of the Government's brief). It attempts to distinguish those cases on the ground that the absence there was apparent from the face of the *judgment* (not, it should be noted, from the face of the *sentence*), whereas here it is apparent only from the face of the *record*. Surely this is a distinction without meaning. In neither case is a hearing necessary. In both cases the District Court has before it (as the Government itself stresses at page 18 of its brief) everything necessary to decide the motion. Neither reason nor necessity calls for such a distinction. Moreover, the argument that the legality of the sentence on its face ousts the District Court of jurisdiction conflicts with the Government's further statement (p. 20) that whether Rule 35 or § 2255 is the proper remedy depends upon "The content of the motion upon which the order is granted * * *, *i.e.*, the relief requested and the grounds given for demanding for relief." If this latter statement is true, the District Court must have jurisdiction to interpret the motion, even incorrectly, and to grant relief. As this Court stated in *Ladner* v. *United States*, 358 U.S. 169, 172-173 (1958),

after discussing cases under § 2255, habeas corpus and Rule 35: "The fact that the Court has so often reached the merits of the statutory construction issues in such proceedings suggests that the availability of a collateral remedy is not a jurisdictional question in the sense that, if not properly raised, this Court should nevertheless determine it *sua sponte*."

The Government suggests (pp. 14-15) that § 2255 did away with the necessity of using Rule 35, but at another point (p. 18) the Government concedes that § 2255 is not always available when Rule 35 is available. It seeks to overcome this hiatus by stating that § 2255 would become available "as soon as [the defendant's] term commenced," and that the denial of the right of allocution "would normally go to all counts." Even assuming that the defendant could wait until some future date for his motion to be acted upon, the Government ignores those cases in which the sentence has already been served[3] or in which the defendant is attacking a federal sentence while in custody under a state sentence.[4] In these cases there is either a remedy under Rule 35 or no remedy at all, even under the Government's theory.

Moreover, if motions such as those filed by petitioners were held to be § 2255 motions, a prisoner seeking to have his sentence vacated would have to pay a $15 filing fee or obtain formal permission to file *in forma pauperis*;[5] the Government, if it could appeal, would have a longer time within which to appeal;[6] the statutory provisions for bail

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[3] See Brief for Petitioners, p. 34 n. 27.

[4] See Brief for Petitioners, p. 34 n. 26.

[5] *Martin* v. *United States*, 273 F.2d 775, 777-778 (10th Cir. 1960), cert. den. 365 U.S. 853 (1961). See also Federal Court Clerks' News, Vol. 20, No. 5, pp. 5, 7-8.

[6] *Klink* v. *United States*, 308 F.2d 775 (10th Cir. 1962).

would not apply; no filing could be made unless the prisoner was actually serving his sentence; great confusion would ensue as to whether civil discovery rules are applicable, and the full record would not necessarily be made a part of the § 2255 proceeding or the § 2255 proceeding made a part of the criminal record.[10]

We submit that Judge Murphy did not lack jurisdiction to grant relief under Rule 35 and that the Government does not seriously think otherwise. For the Government conceded on the record (R. 48) that Judge Murphy granted relief "under Rule 35," and if the Government really thought Judge Murphy was acting wholly without jurisdiction, it would have sought mandamus rather than an appeal (see Brief for Petitioners, p. 28 n. 21).

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[8] See Brief for Petitioners, pp. 17-18; R. 74-73.

[9] See Brief for Petitioners, pp. 33-34, and *Grant* v. *United States*, 308 F.2d 728 (5th Cir. 1962).

[9a] *Cf. Fulwood* v. *Clemmer*, D.C.D.C., Civil Action No. 3211-61, filed January 17, 1962 (unreported).

[10] See Brief for Petitioners, p. 33.

III.

The District Court Was Correct in Ordering Resentencing.

The Government does not deny that "aggravating circumstances" during a sentencing procedure are grounds for a collateral attack upon a sentence.[11] But it says there were no such aggravating circumstances in this case.

(a) *The argument during the absence of the defendants and of one of the defense attorneys.*

The Government contends (pp. 27-30) that petitioners could not have been prejudiced by the argument held in their absence because the only subject discussed was whether two counts of the indictment merged. But the Government itself refutes this statement, because it says at page 5 of its brief that during the absence of the defendants, "Counsel [Mr. Friedman] also requested the court to grant the defendants some consideration for the time already spent in prison (R. 21-24)." The record shows, in fact, that half of Mr. Friedman's entire presentation during the absence of the defendants and of Mr. Healey was devoted to matters other than whether the first two counts merged (R. 23-24). Friedman referred, for example, to the time the defendants had already spent in prison, the reports in the possession of the Court dealing with the

[11] The First Circuit Court of Appeals has recently remanded the *Green* case which was before this Court at 365 U.S. 301 because of what it deemed aggravating circumstances. Following this Court's decision, Green filed a motion under § 2255 seeking, *inter alia*, an opportunity to show that he had not, in fact, been asked by the sentencing court whether he wished to speak, and to show further what he would have said had he been allowed to speak. The Court of Appeals held that he was entitled to show these facts. *Green v. United States*, No. 6026, decided January 23, 1963 (not yet reported). The "aggravating circumstances" consisted entirely of matters which Green wanted to tell the sentencing court and were thus far less aggravating than the circumstances in this case.

defendants' families and background, the limited means of the defendants' families, and the Court's prior disposition to grant less than mandatory sentences—all constituting an obvious appeal for probation and having nothing whatever to do with the merger of counts.

Moreover, the presentation of an argument during the absence of petitioners and Healey was fundamental error regardless of what was discussed, because those who were absent had no way of knowing what transpired—a vital omission with far-reaching consequences during the all-important moments before the Court decided what sentences were to be imposed.[12] One of the purposes of Rule 43 is to make Rule 32 (a) effective—that is, to allow a defendant to speak in the light of the facts that have been brought out not only at trial but at the sentencing procedure. The Rule 32 (a) right is largely meaningless if the defendant has not been present for all of what has gone before.

The Government says (p. 30) that the absence of Healey was not important because Friedman repeated his legal argument in Healey's presence, and because Friedman represented all three defendants. As pointed out above, Friedman made more than a legal argument in Healey's

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[12] See Brief for Petitioners, p. 41. Any attempted comparison of what occurred here with a conference at the bench or in judge's chambers is wholly fallacious. Such "private" conferences have a limited, even a questionable, role in criminal proceedings (*cf. Smith* v. *United States*, 238 F.2d 925, 930-931 (5th Cir. 1956), see also same case, 360 U.S. 1, 3, 17-18 (1959)), and many judges do not allow them at all. But even where they are allowed, they never deal with a matter as basic as the proper sentence to be imposed. The Fifth Amendment and Rule 43 could hardly mean that a sentence can be agreed upon by the judge and the attorneys in private, with the defendant called in merely for the pronouncement. The importance of the presence of a defendant during the sentencing procedure has recently been stressed in *Behrens* v. *United States*, 312 F.2d 223 (7th Cir. 1962).

absence—he made a plea for probation. And he did not even repeat his entire legal argument during Healey's presence. Nor is there any showing that Healey *knew* what was said during his absence. But most importantly, the points Friedman did make in Healey's presence were stated *after*, not before, the Court had imposed sentences (R. 30-33), so it was obviously too late for Healey to have his say.

The point in regard to which defendants Friedman represented is not free from doubt. Friedman told the Court during Healey's absence that he represented all three defendants, even though they were differently situated (R. 20, 23). But it is to be noted that the docket entry showed that he appeared only on behalf of Andrews and Cohen, and that Healey appeared on behalf of Donovan (R. 20), and the judgments entered by the Court showed that Friedman appeared for Andrews, and Healey for Donovan (R. 33, 34). In any event, Donovan apparently had reasons of his own for retaining Healey as his counsel, and whether Healey appeared in addition to or in place of Friedman, he was entitled to be present.

(b) *The Court's misconception of the facts.*

The Government quotes language which purports to show that the Court was told, and understood, that Andrews was not on the truck at the time of the holdup (pp. 31-34). We submit that the quoted material not only fails to show the true facts but may have helped to mislead the Court.[13]

The first quotation, on page 31, states that Donovan attempted the holdup with a revolver and that Andrews "planned and helped execute the holdup," a phrase that

[13] A trial court's "misreading of the record" just prior to sentencing was one ground for granting a writ of habeas corpus in *Townsend* v. *Burke*, 334 U.S. 736 (1948).

could easily have misled the Court as to the part played by Andrews. The quotation on page 32 never mentions Andrews and therefore could hardly have made his role clear to the Court. The quotations of the Court at page 33 reinforce rather than dispel the notion that the Court misunderstood Andrews' role, for Andrews did not "carry out the crime" any more than Cohen did, nor had he "committed the holdup" any more than Cohen had, and he certainly was not "on the truck."

The Government's evidence in this case, if believed, showed that Cohen himself was in the vicinity of the holdup immediately prior to the crime (Original Transcript on file with the Court, pp. 111-112), that Andrews left the immediate scene of the crime *before* Donovan even got into the mail truck, and that Andrews was arrested, unarmed, a full block away from the crime. (Original Transcript, pp. 191-193, 252-256, 307-313, particularly p. 311. See also Original Transcript, pp. 80-84, 90-93, 106-107, 121-122, 146-147, 158-159, 167-171, 325-336, 339-340, 345.)[14]

(c) *The defendants clearly were not allowed to speak in their own behalf.*

The Government does not claim that any question was directed by the Court to the defendants themselves and does not dispute the fact that the version of the sentencing procedure given by the Court of Appeals was inaccurate. The Government contents itself with the proposition that "every extenuating circumstance known to the petitioners was brought forward by their attorneys" (p. 26)—a wholly

[14] Certainly any reliance upon the presentence report for the facts is misdirected (Government's Brief p. 32), because we do not know what was in that report. It could even have been the source of the Court's confusion.

gratuitous assumption which can only be tested by allowing petitioners to have their say. It should be noted that Rule 32 (a) is unequivocal; it does not provide that a defendant is to be allowed to speak only when his attorney fails to speak. Moreover, Rule 32 (a) grants a defendant two rights: to make a statement in his own behalf, and to present information in mitigation of punishment. Even assuming that an attorney could supply the information in mitigation of punishment, the right to speak in one's own behalf, by the nature of things, is personal to the defendant. See *Green v. United States*, 365 U.S. 301, 304, 307 (1961). Here, that right was clearly denied.

(d) *Other aggravating circumstances.*

The Government does not dispute that Donovan had a record, so that it was particularly important for him to speak, and on the subject of the failure to grant the right of allocution at the initial sentencing in 1954, the Government contends that this had nothing whatever to do with the violation in 1957 (p. 27 n. 5). On this latter point, it should be noted that Judge Walsh could not have had the advantage of a presentence report at the initial sentencing, since the sentencing took place immediately following the jury verdict (Appendix B of Petitioners' Brief), despite the requirement of Rule 32 (c) (1) that such a report be made to the court prior to sentencing. Therefore, although petitioners were theoretically "resentenced" in 1957, they obviously were disadvantaged by the fact that 25-year sentences had been outstanding against them for two and a half years before any presentence report was ever made, and Judge Walsh allowed the original sentences to "remain unchanged and in full force and effect" (R. 33, 34). Certainly it is relevant that to this day—more than eight years after the initial sentencing—petitioners

have yet to say their first word in mitigation of sentence or on their own behalf.[15]

Conclusion

Without so much as a mention of such cases as *Stack* v. *Boyle*, 342 U.S. 1 (1951); *Carroll* v. *United States*, 354 U.S. 394 (1957), and *DiBella* v. *United States*, 369 U.S. 121 (1962), the Government is asking the Court to carve out another exception to the rule that the Government may not take interlocutory appeals from orders which are essentially and in practical effect a part of a criminal proceeding. Nor has the Government given the Court any reason why such an exception is necessary. The Administrative Office of the United States Courts informs counsel for petitioners that of the almost 600 motions to vacate sentences disposed of by the United States District Courts during fiscal 1962 under Rule 35 *and* § 2255, only 18 resulted in the granting of some form of relief. Surely the fair administration of justice does not require interlocutory review of these few cases. On the contrary, in view of the fact that an interlocutory review in many cases defeats the very right which

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[15] The Government refers to the fact (p. 26) that until their present appeal, petitioners made no reference on appeal to the circumstances surrounding their resentencing. This is easily explained by the fact that heretofore petitioners have always been represented on appeal by one or more of the same attorneys who represented them at the original sentencing and at the resentencing and who had either taken part in, or had failed to object to, the various aggravating circumstances about which petitioners complain. See 242 F.2d at 62; 252 F.2d at 788; 263 F.2d at 608. Apparently petitioners did not know until this Court decided *Green* v. *United States*, 365 U.S. 301 (1961) that they were entitled to a right which had been denied them, because their motions were filed within a few months after that decision was rendered.

Rule 35 and § 2255 seek to protect, the fair administration of justice demands that Government appeals in these cases be denied.

Respectfully submitted,

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